

July 28, 2000

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

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Margaret Egler
Chief, Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20054

Re: *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115

Dear Ms. Egler:

The Competition Policy Institute ("CPI"), by and through its undersigned counsel, is writing to recommend to the Policy Division of the Common Carrier Bureau certain options for its consideration in developing rules governing the disclosure of customer proprietary network information ("CPNI").

As adopted in the Commission's Second Report and Order in this docket ("*Second CPNI Order*"), released February 26, 1998, the Commission's CPNI rules established an "opt-in" regime, whereby carriers were prohibited from releasing a customer's CPNI or using it for targeted marketing of new services absent prior, express consent from the customer. *Second CPNI Order* ¶ 91. The Commission considered and expressly rejected an "opt-out" approach, one which permitted carriers to use CPNI in this manner until the customer withdrew consent, as inadequate to protect Congress's significant competitive and privacy concerns regarding CPNI. *Id.* ¶¶ 94-97. The Commission's decision was criticized by the Tenth Circuit in *US West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), and the *Second CPNI Order* was vacated. Thus, at this time, the regulations governing use and disclosure of CPNI remain unclear for both carriers and consumers. As a result of this lack of clarity, consumers may be left unprotected with respect to the confidential information that carriers have obtained from them.

To minimize the danger of improper use of CPNI, and to clarify for carriers their responsibility in using and disclosing CPNI, CPI recommends that the Commission adopt a two-part approach to the regulation of CPNI at this juncture. First, the Commission should release stan-

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dards and rules, based on its earlier opt-out regime, that will govern CPNI following the vacation of the *Second CPNI Order*. Secondly, the Commission should concurrently issue a Further Notice of Proposed Rulemaking ("FNPRM") to solicit comment on the Commission's opt-in approach to CPNI as formulated in the *Second CPNI Order* and whether that approach is sustainable and proper. CPI believes that this action, taken in as expeditious manner as possible, is necessary to protect the vital privacy interests of consumers in this murky post-Tenth Circuit period while setting the framework for further Commission decision on CPNI.

Commission Regulation of Carrier Use of CPNI Is Necessary to Protect the Vital Privacy Interests of Consumers

CPI's chief concern in this matter remains to safeguard the privacy interest of consumers in CPNI and to ensure they receive actual notice and retain a degree of control with regard to the manner in which CPNI is used. The personal data of which CPNI is comprised reveals a great deal of information, often highly sensitive, about the daily affairs of telephone users. Indeed, the Commission has recognized the significant public interest of regulating CPNI usage and had promulgated rules for that purpose since prior to the divestiture of AT&T.¹ Moreover, it was this privacy interest that Congress sought to protect in enacting Section 222 of the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 222. The Tenth Circuit did not challenge the validity or importance of the privacy interest reflected in the 1966 Act; accordingly, the Commission must remain proactive in this area and continue to provide guidance for use and release of CPNI, especially in the interim period prior to promulgation of new CPNI rules on remand from the Tenth Circuit.

The privacy interests of American consumers is of increasing importance in this age of ubiquitous information access. This interest lies not only in telecommunications information, but in the several areas of commerce for which Congress is presently crafting privacy legislation.² As was demonstrated by the evidence presented by US West in this docket, consumers will protect those privacy interests if they in fact receive actual notice that their confidential CPNI may be disclosed or used for marketing purposes. *Second CPNI Order* ¶¶ 99-100. It is hardly open to

¹ See, e.g., *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, 77 FCC.2d 384 (1980) (*Computer II*), recon., 84 FCC.2d 50 (1980), further recon., 88 FCC.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702(a) of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services and Customer Premises Equipment*, 101 FCC.2d 349 (1985), recon., 3 FCC Rcd. 4385 (1986).

² E.g., *Consumer Internet Privacy Protection Act of 1999*, H.R. 313, 106th Cong. 1st Sess. (1999); *Medical Information Privacy Act of 1999*, H.R. 1057, 106th Cong. 1st Sess. (1999); *Electronic Rights for the 21st Century Act*, S. 854, 106th Cong. 1st Sess. (1999).

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question that consumers would continue to act to protect their CPNI privacy if the Commission promulgates CPNI rules that enable informed consumer choice.

If the Commission Allows Carriers to Use the "Opt-Out" Approach on an Interim Basis, It Should Substantially Strengthen Notice Requirements

CPI believes that the Commission clearly has the statutory and procedural authority to adopt an opt-in CPNI regime in the wake of the Tenth Circuit decision. In view of the Court's action vacating the *Second CPNI Order*, however, the Commission may be unwilling to enforce an opt-in requirement as an interim measure. We believe opt-in is appropriate and can and should be reaffirmed as the correct long-term CPNI rule under Section 222 if the Commission provides the more extensive explanation that the Tenth Circuit found lacking in the Commission's initial Order. Regardless of whether the Commission eventually adopts opt-in on remand, however, the Commission still must grapple with what CPNI rules should apply pending the conclusion of its FNPRM proceeding.

As an interim step, CPI recommends that the Commission enforce an opt-out requirement for CPNI pending its further investigation. This opt-out requirement, which simply extends the Commission's CPNI rules that were in effect prior to enactment of Section 222,³ offers at least some protection for consumers' interests if shaped in a way that gives consumers the opportunity for an informed choice. That is, the Commission should establish specific, interim guidelines on the processes for administering an opt-out CPNI system that will ensure that consumers receive actual and meaningful notice of their rights in, and potential uses of, CPNI. Once proper notice is given to consumers, carriers will be free to use CPNI for marketing additional services to consumers until consent is withdrawn.

CPI suggests that there are several ways to effect notice such that consumers are more fully apprised of their rights, even under an opt-out regime. Carriers may contact consumers by telephone calls that are monitored by independent third parties, much like the calls conducted today by long-distance carriers for presubscription change verification, giving oral notice to consumers and permitting them the opportunity to withdraw consent. In the alternative, carriers can distribute a conspicuous written notice, separate from "bill stuffers," to consumers and provide a means for consumers to provide a return receipt, which ensures that the notice was actually received.

The Commission should recognize that some carriers may not wish to change their current opt-in practices for a temporary period while long-term CPNI rules are re-established. To

³ See generally *Second CPNI Order* ¶¶ 176-79 (discussing the Commission's pre-Section 222 CPNI rules requiring annual consumer notices and opportunity to withdraw consent).

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address this situation, the Commission should also offer carriers a "safe harbor" guideline, providing that if carriers are unable to comport with these opt-out requirements, they may continue to adhere to the opt-in rules adopted in the *Second CPNI Order*. The decision to use this safe harbor would lie entirely within the carrier's sole discretion. Such voluntary use of the opt-in rule is not violative of the Tenth Circuit's decision, as that opinion prohibits only the mandatory imposition of opt-in rules for CPNI. *US West v. FCC*, 182 F.3d at 1240. Providing this option, however, will permit carriers a menu of options for using CPNI, each of which would protect the vital privacy interests inherent in that use.

The Commission's Interim Guidelines Should More Closely Regulate Carrier Disclosure of CPNI to Third Parties

CPI structured the interim proposal set forth above to govern CPNI only with regard to its use by a carrier for its own targeted marketing. That approach is inadequate to govern carrier disclosure of CPNI to private third parties. Third-party disclosure raises myriad additional issues that are significantly more troubling, and more difficult to solve. In this circumstance, telecommunications users' confidential information deserves much more stringent protection. Therefore, CPI recommends that, while the Commission's rules remain vacated, *an opt-in regime should be applied to third-party CPNI disclosure*.

The opt-in regime as applied to third parties is not prohibited by the Tenth Circuit's decision in *US West v. FCC*. In that case, US West had raised, and the court addressed, solely the issue of whether an opt-in rule was proper in the context of use by the carrier itself. 182 F.3d at 1230. The court of appeals neither discussed nor held that the FCC's opt-in rule was inappropriate to govern disclosure of CPNI to third parties. Therefore, the Commission should continue to enforce its opt-in rule to govern the release of confidential CPNI by a carrier to any other carrier, marketing organization, or any third party.

The Commission Should Conduct a Further Investigation to Explore the Merits and Requirements of Its Opt-In CPNI Rules

In tandem with its promulgation of interim guidelines, the Commission should initiate an additional FNPRM proceeding that will enable it to explore more deeply the many significant concerns surrounding use and disclosure of CPNI. To provide a scope to the discussion, the Commission's notice can provide commenters with specific issues to address, much like its Further Notice in the *UNE Remand* proceeding provided. These issues should focus on the sensitive nature of CPNI, the merits of rules that give consumers true, informed control over its disclosure, and the feasibility of methods that will give consumers that control. By framing the debate in this manner, the Commission will be able to revisit its rules and provide a thorough rationale

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for its decision, thus satisfying the concerns of the Tenth Circuit that adequate consideration had not been afforded to opt-out solutions. *See* 182 F.3d at 1239-40.

CPI suggests that the Commission offer the following as topics for comment in its further investigation:

- What are the potential uses CPNI, both by carriers and by third parties?
- What is the value of using CPNI for those purposes?
- What are the privacy interests involved in use of CPNI by (1) carriers, and (2) private third parties?
- What are the relative costs, convenience, notice, informed consent and privacy protection consequences of either and opt-in or opt-out approach to CPNI release or sale?
- What are the competitive interests involved in use of CPNI by (1) carriers, and (2) private third parties?
- What was Congress's intent in Section 222 for requiring customer "approval" for use of CPNI?
- By what means can "approval" be best achieved?
- Of the above, which means are the most feasible?
- Does a permissive regime, in which carriers may use CPNI until consumers withdraw individual consent, adequately protect the interests impinged upon by the use or release of CPNI?
- Are consumers likely to research actively their rights to, and potential uses of, CPNI absent actual, effective notice?
- Are there other rules, laws, or regulatory regimes that govern matters similar to CPNI that the Commission may use as an analog for this proceeding?

In addition to providing comment on specific issues such as these, commenters should be encouraged to provide empirical data regarding consumer's concerns with CPNI and their ability

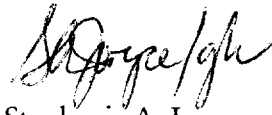
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to act on their own behalf to relieve those concerns. Parties may, for example, conduct controlled polls of telephone users, Internet surveys and other user preference research to elicit responses on their understanding of CPNI, privacy interests and preferences for notice and

By initiating an FNPRM proceeding along these parameters, the Commission will be able to investigate the issues posed by CPNI, and by the Tenth Circuit's ruling, and adopt meaningful, well-reasoned final rules.

CPI looks forward to participating in the Commission's further efforts to craft viable and meaningful rules that will protect consumers' interests in CPNI. We are confident that a result can be achieved soon that will be favorable for all concerned. Please do not hesitate to contact us for additional comment regarding the issues discussed in this presentation.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Joyce/gk", written over a horizontal line.

Stephanie A. Joyce

cc: Magalie R. Salas, Secretary
Ronald J. Binz, CPI
Debra R. Berlyn, CPI